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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

WARD-ASKEW INSURANCE
PARTNERS et al.,

Cross-complainants and Appellants,

v.

DRANEY INFORMATION SERVICES
CORPORATION,

Cross-defendant and Respondent.

G040494

(Super. Ct. No. 06CC10626)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Andrew P. Banks, Judge. Reversed.

Lewis Brisbois Bisgaard & Smith, R. Gaylord Smith, Ernest Slome, and Matthew B. Stucky for Cross-complainants and Appellants.

Morgan, Lewis & Bockius, Paul A. Richler, Davis S. Cox and Tricia A. Takagi for Cross-defendant and Respondent.

Ward-Askew Insurance Partners (Ward-Askew) and Askew Kabala & Company (Askew-Kabala) appeal from the judgment in favor of Draney Information Services Corporation (DISC), in this action involving a failed effort at selling a DISC subsidiary to Ward-Askew. Judgment was entered after DISC's motion for summary adjudication on declaratory relief and breach of contract causes of action contained in Ward-Askew's cross-complaint was granted, the trial court denied Ward-Askew's motion to amend its cross-complaint, and the parties stipulated to dismiss remaining causes of action. On appeal, Ward-Askew contends there were material issues of fact precluding summary adjudication. We agree and reverse the judgment.

FACTS

Background

DISC has two wholly owned subsidiaries: WRLJ Maple Corporation (Maple), a company that provides production services for the entertainment industry; and Entertainment Risk Management Insurance Company, Inc. (ERMIC), a captive insurance company (a captive insurance company is one owned by another organization for the exclusive purpose of insuring the risks of the parent organization and/or its affiliates). (See, e.g., Ins. Code, § 1216.1, subd. (e)(3).) Ward-Askew is a joint venture, formed to effectuate a purchase of ERMIC, between The Ward Group, LLC (the Ward Group), an insurance financial services holding company, and Askew-Kabala, an investment banking firm.

As a captive insurance company, ERMIC's primary purpose was to provide workers' compensation insurance for Maple's workforce. Coverage was provided through either a "deductible program" or a "reinsurance program" depending upon the state where the worker was employed. Both programs were administered by an unrelated company, CNA Financial Corporation (CNA), which received its payments through a trust fund controlled by ERMIC.

Negotiations to Sell ERMIC to Ward-Askew/The Letter of Intent

On December 17, 2005, Ron Askew, an owner of Askew-Kabala, and the owners of DISC (and ERMIC), Robert Draney and Jack Peterson, signed a letter of intent concerning the sale of ERMIC to Ward-Askew (the Letter of Intent). The Letter of Intent specified it was “a non-binding expression of the parties [*sic*] general agreement as to the major business issues of the Transaction for the purpose of advancing the negotiation process and facilitating the preparation of all appropriate formal documentation. If the parties for any reason(s) fail to enter into all necessary formal documentation, the Transaction shall be deemed terminated, and no party shall have any liability to any other party arising from or attributable to [the Letter of Intent] or the Transaction. No party may sue any other party on the basis of [the Letter of Intent], and all parties waive all rights to do so.”

The Letter of Intent summarized certain financial assumptions regarding ERMIC, and the financial terms of Ward-Askew’s offer to purchase ERMIC, including a purchase price of \$30 million, “subject to the execution and delivery by Purchaser and Seller of a [stock purchase agreement] and all other documents related to this transaction.” Ward-Askew was to conduct due diligence; escrow would close by January 31, 2006, but could be extended to February 28, 2006, if necessary “for reasons of due diligence completion and regulatory approvals. . . .” The funds held in trust for CNA were identified as an ERMIC asset, but there was no other mention of CNA or Maple.

The Letter of Intent contained a “no-shop” provision (by which DISC agreed to refrain from negotiating with any other prospective purchasers) and a “lock-up” provision (by which DISC agreed it would not transfer existing or issue new shares of ERMIC), both of which ran for 60 days from execution of the Letter of Intent. The parties agreed they would “commence and diligently pursue in good faith the negotiation, drafting, execution, delivery and performance of all formal documentation necessary to fully consummate the Transaction. Such documentation shall conform to the substance

of this [Letter of Intent] and may include such other agreements, representations, warranties, covenants, contingencies and conditions as may be mutually agreed upon.”

ERMIC Sale to Ward-Askew Does Not Go Through/Instant Action

The sale of ERMIC to Ward-Askew was not completed, and on October 3, 2006, DISC filed a complaint for declaratory judgment against Ward-Askew and unnamed Does. (Apparently Askew-Kabala was eventually served as a Doe defendant.) DISC alleged that after the Letter of Intent was signed, the parties continued to negotiate terms, but they never reached a final agreement and never entered into a final written contract for the sale of ERMIC. But Ward-Askew claimed there was a final binding agreement for the sale of ERMIC to Ward-Askew. DISC also alleged the 60-day no-shop provision in the Letter of Intent had never been extended and expired in February 2006, but Ward-Askew claimed DISC was prohibited from negotiating with any other prospective purchaser. DISC sought a declaration there was no binding agreement for the sale of ERMIC to Ward-Askew and that DISC was not prohibited from negotiating with other buyers.

Ward-Askew filed a cross-complaint against DISC.¹ It alleged that when the Letter of Intent was signed, DISC representatives indicated there were no material issues concerning contractual liabilities of ERMIC to Maple or CNA. Ward-Askew alleged that in January 2006, it commenced due diligence, which included reviewing CNA’s and ERMIC’s claims and actuarial data. Thereafter, the parties “modified several of the terms of the Letter of Intent orally and through written communications, and reached a valid and binding agreement regarding the sale of ERMIC to Ward-Askew.”

¹ CNA was also named, served, and answered the cross-complaint, but the disposition of the action as to it does not appear in the record. Additionally, it appears Askew-Kabala also filed an identical cross-complaint which is not part of the record, to which DISC’s motion for summary adjudication was also directed. The judgment is against Ward-Askew and Askew-Kabala, and both are appellants. For convenience, we generally refer to them collectively and in the singular as Ward-Askew.

Ward-Askew alleged the parties agreed their subsequent “oral and written agreements” regarding the sale “were valid and binding, notwithstanding their intent to sign a more formal writing memorializing their agreements.” Among the contract terms, Ward-Askew alleged DISC had agreed upon a \$26 million sales price and to an “open-ended extension of the Letter of Intent” to obtain regulatory approval of the sale from the State of Hawaii (where ERMIC was formed) and “resolve with CNA the non-material issues regarding” its contracts with ERMIC.

Ward-Askew alleged that through August 2006 it continued to work on closing the sale. When the State of Hawaii would not approve the sale of ERMIC to a non-affiliated company, DISC and Ward-Askew agreed to re-domesticate ERMIC in Nevada so as to obtain regulatory approval there. Ward-Askew was still waiting for DISC to work out the “non-material issues” with CNA. Unbeknownst to Ward-Askew, DISC was actually negotiating the sale of ERMIC to CNA. In late August 2006, Ward-Askew learned CNA had offered DISC \$28 million for ERMIC “through a ‘loss portfolio transfer.’”

Ward-Askew’s cross-complaint contained causes of action against DISC for: (1) declaratory relief; (2) breach of contract based on the agreement to sell ERMIC to Ward-Askew; (3) breach of contract based on a promise to negotiate in good faith; and (4) breach of contract based on the no-shop provision of the Letter of Intent. (The complaint also alleged causes of action against CNA for intentional interference with contractual relations and prospective economic advantage.)

DISC’s Motion for Summary Adjudication

DISC filed a motion for summary adjudication on its complaint and on the breach of contract causes of action in Ward-Askew’s cross-complaint, generally on the grounds there was no binding enforceable agreement to sell ERMIC to Ward-Askew, the Letter of Intent conferred no enforceable rights, and the no-shop provision had expired. As to the cause of action for breach of agreement to sell ERMIC to Ward-Askew, DISC

asserted there had been no contract formation for three reasons: (1) the Letter of Intent provided there was no contract until the parties entered into a formal written agreement; (2) the parties had never come to a mutual agreement as to all material terms of the transaction because they could never resolve how to eliminate or minimize Maple's "residual liability" to CNA; and (3) regulatory approval of the transaction was a condition precedent to contract formation and Ward-Askew never obtained such approval.

In DISC's separate statement of undisputed material facts it explained that under the deductible program, ERMIC insured Maple's "first dollar" exposure. Maple got insurance from CNA with a high deductible, and ERMIC was responsible for Maple's entire deductible risk. The premiums were placed by ERMIC into a trust fund from which CNA could draw to pay claims within Maple's high deductible amount. Under the reinsurance program, Maple paid premiums to ERMIC, but was still insured by CNA, CNA in turn was reinsured by ERMIC for any payments CNA made. Again, the premiums were placed in an ERMIC trust fund from which CNA could draw to reimburse itself for payments made. Under either insurance program, CNA could draw on the ERMIC trust fund to reimburse itself for amounts paid on Maple's behalf. If ERMIC were to be sold to an unaffiliated entity, the buyer would get control of those trust funds, but Maple would still have potential exposure to CNA for payments CNA made under the deductible program.

DISC also explained the Letter of Intent was prepared by Ward-Askew to memorialize its offer, and it specifically provided the transaction was subject to negotiation and execution of a written contract. Ward-Askew principals, Jeffrey Ward and Askew, both testified at their depositions execution of a written agreement was a condition to effectuating a sale. A significant issue arose during the due diligence period regarding how to handle Maple's financial exposure to CNA on the deductible program once ERMIC was sold. Maple's liability needed to be assigned to any proposed buyer, a

resolution CNA did not particularly like. At a meeting on March 3, 2006, Ward-Askew suggested the CNA matter be resolved by providing DISC an \$11 million letter of credit that could be drawn on to reimburse for ERMIC-insured losses. Askew sent a proposed addendum to the Letter of Intent, modifying key terms and stating the addendum would be binding and all other terms in the Letter of Intent were ratified. DISC did not execute the proposed addendum.

For the next several months the parties were working on drafts of a stock purchase agreement. The Maple/CNA residual liability issues were still not resolved. There were numerous e-mails between the principals and their attorneys concerning the Maple/CNA issue. Ultimately, the parties were not able to resolve the issue and never entered into a written agreement for sale of ERMIC to Ward-Askew.

DISC's separate statement also set forth facts concerning regulatory approval of any proposed sale of ERMIC. Approval was being sought in Nevada. The administrator of captive insurance programs for the Nevada State Insurance Commissioner had written to Ward-Askew indicating approval of a transfer of ERMIC to Ward-Askew, but three days later, he withdrew the letter because it was a staff recommendation and only the Commissioner could approve the transaction upon receipt of a fully executed stock purchase agreement.

DISC also included Ward-Askew's interrogatory responses to questions concerning the basis of and terms of its contract claim. Ward-Askew responded its breach of contract claim was based on the Letter of Intent "coupled with subsequent oral and implied agreements modifying [the Letter of Intent]." Ward-Askew stated the terms of the contract were: (1) a purchase price of \$26 million agreed to on April 7, 2006; DISC's providing Ward-Askew with a hold harmless agreement relating to any other potential buyers of ERMIC; (3) DISC's agreement to assist Ward-Askew in re-domesticating ERMIC in Nevada and assisting in obtaining regulatory approval of the sale agreed to in March and May of 2006; and (4) an agreement the sale would close as

soon as regulatory approval was received, regardless of the status of the CNA issues agreed to in April 2006.

With regard to Ward-Askew's breach of contract cause of action based on the no-shop clause in the Letter of Intent, DISC's separate statement included the fact the clause expired February 15, 2006, and Ward admitted in his deposition no one from DISC ever said the provision was extended.

Ward-Askew's Opposition to Motion for Summary Adjudication

In its opposition to the motion for summary adjudication, Ward-Askew asserted the Letter of Intent was actually replaced by an oral contract concerning the sale of ERMIC negotiated at a meeting on March 3, 2006. Ward-Askew submitted declarations from Ward, Askew, and another Ward-Askew representative, Marc LaPointe. All stated that at the March 3 meeting, all material terms of the sale were agreed upon. The principals of DISC (Peterson and Draney) wanted \$26 million all cash, but they agreed to sell ERMIC for a total of \$27 million comprised of \$18 million cash and three annual \$3 million payments. In April, Draney told Ward he would still prefer \$26 million all cash, so that one term was modified. They agreed the sale would be subject only to obtaining regulatory approval. Peterson and Draney assured the buyers none of the CNA issues were material to the transaction and they would close the deal regardless of any CNA issues. Askew declared that although he expected there would ultimately be "a formal written purchase agreement," there was no indication from anyone that assent was effective only upon execution of a written agreement, and assent at the time was unconditional.

DISC's Reply

In its reply, DISC argued Ward-Askew's opposition was based on facts and theories outside its pleading—namely that there had been a novation of the Letter of Intent and its breach of contract cause of action was based upon an oral contract allegedly reached at the March 3 meeting. DISC pointed to Ward-Askew's cross-complaint and

various discovery responses by Ward-Askew. In its first set of interrogatory responses, Ward-Askew stated DISC and Ward-Askew orally extended the Letter of Intent indefinitely. When asked to identify all written and oral components of the alleged contract, Ward-Askew identified the Letter of Intent, a letter Askew wrote confirming the Letter of Intent was extended and ratified, and telephone conversations between April and June in which DISC representatives confirmed the deal would close upon receiving regulatory approval. When asked to identify when each term of the agreement had been reached, Ward-Askew identified several, none of which were on March 3. When asked if any of the agreements alleged in its pleading had been “terminated by mutual agreement, release, accord and satisfaction, or novation[,]” or was unenforceable, Ward-Askew replied, “No.”

At his July 26, 2007, deposition, Askew testified his February 23, 2006, letter confirmed the Letter of Intent was being extended. He also testified that at the time the Letter of Intent was signed, it was agreed the transaction was deemed terminated if formal written documentation was not completed, and even in the face of subsequent discussions “[t]here was an agreement to always go at some point . . . into formal documentation.” Ward similarly testified at his July 13, 2007, deposition “[t]he agreement to purchase the company was entered into when the [Letter of Intent] was signed and then later via oral representations.” He also testified it was always his understanding that formal documentation had to be completed, without which “the deal could be terminated.”

Ruling on Summary Adjudication Motion

On November 30, 2007, the trial court granted DISC’s summary adjudication motion as to Ward-Askew’s causes of action for declaratory relief (first cause of action); breach of contract based on the agreement to sell ERMIC to Ward-Askew (second cause of action); and breach of contract based on the no-shop provision of the Letter of Intent (fourth cause of action). It denied the motion as to

DISC's declaratory relief complaint. The court concluded Ward-Askew's opposition attempted to demonstrate a material issue based on a theory not alleged in, and that directly conflicted with, its cross-complaint.

Motion to Amend Cross-Complaint/Judgment

Ward-Askew subsequently filed a motion for leave to amend its cross-complaint. The proposed pleading alleged the parties signed the Letter of Intent in late 2005, but it was not binding and had expired. They continued negotiations and at a meeting on March 3, 2006, the parties orally agreed to all material terms of the sale of ERMIC to Ward-Askew. Most of the terms of the agreement had been performed, but DISC would not close the sale because it was instead negotiating to sell ERMIC to CNA. The proposed amended complaint contained two causes of action against DISC (CNA was not named in the amended complaint); the first for breach of the March 3, 2006 oral contract, and the second for breach of its duty to negotiate in good faith as required by the Letter of Intent.

Ward-Askew argued the amended pleading was necessary in view of the court's conclusion as to the summary adjudication motion that Ward-Askew's assertion the Letter of Intent was replaced by the oral contract formed at the March 3, 2006, meeting was not plead in and conflicted with the allegations in the original cross-complaint. It was not until current counsel had substituted in July 2007 that the March 3 meeting's significance became the central focus of the case. Although the original cross-complaint did not specifically mention the March 6 oral contract, the allegations of the cross-complaint envisioned there were oral agreements made after the Letter of Intent was executed that formed the basis for the breach of contract cause of action. And although initial interrogatory responses did not identify the March 3 meeting as the basis for the breach of contract claim, DISC would not be prejudiced by the proposed amendment because the March 3 meeting had already been fully explored in depositions, and Askew-Kabala had filled supplemental interrogatory responses referring

to that meeting. Thus, since the parties had already been litigating on the basis of Ward-Askew's theory the contract was the result of oral agreements reached on March 3, no additional discovery would be required.

DISC's opposition to the motion to amend the cross-complaint largely tracked its reply to Ward-Askew's opposition to the summary adjudication motion. The trial court denied the motion to amend under the sham pleading doctrine finding "a strong onus of untruthfulness to the proposed pleading[.]" because the amended complaint contradicted and omitted the fatal allegations of the original cross-complaint. After that ruling, Ward-Askew dismissed with prejudice its remaining cause of action that had not been the subject of the summary adjudication order (i.e., the third cause of action for breach of agreement to negotiate in good faith), and DISC dismissed without prejudice its complaint for declaratory relief. Judgment was entered in favor of DISC, and Ward-Askew and Askew-Kabala appealed.

DISCUSSION

Ward-Askew contends the trial court erred by granting DISC's summary adjudication motion as to its second cause of action for breach of its agreement to sell ERMIC because there were material issues of fact as to contract formation. We agree.

"The rules governing a motion for summary [adjudication] are well known and we need not set them out in detail. A defendant seeking summary [adjudication] must either prove an affirmative defense, disprove at least one element of the plaintiff's cause of action, or show that some such element cannot be established. [Citation.] The opposing party need not prove his or her case; it is enough to show that a triable issue of material fact exists. [Citation.] The evidence and affidavits of the moving party are construed strictly, while those of the opponent are liberally read. [Citation.] Our review of the trial court's decision is de novo. [Citation.]" (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 100 (*Government Employees Ins. Co.*)).

DISC sought summary adjudication on the contract causes of action on the grounds there was not a binding contract for the sale of ERMIC for the following reasons: (1) the parties agreed in the Letter of Intent there would not be a binding agreement without an executed written contract; (2) the parties failed to agree to a material term—namely how to resolve the CNA/Maple liability issues; and (3) regulatory approval of the sale of ERMIC was a condition precedent to contract formation and had not been obtained.

Writing

The legal principles applicable to contract formation are well known. “An essential element of any contract is ‘consent.’ [Citations.] The ‘consent’ must be ‘mutual.’ [Citations.] ‘Consent is not mutual, unless the parties all agree upon the same thing in the same sense.’ [Citations.] [¶] ‘The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe.’ [Citation.] Outward manifestations thus govern the finding of mutual consent required . . . for contract formation. [Citation.] The parties’ outward manifestations must show that the parties all agreed ‘upon the same thing in the same sense.’ (Civ. Code, § 1580.) If there is no evidence establishing a manifestation of assent to the ‘same thing’ by both parties, then there is no mutual consent to contract and no contract formation.” (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810-811; see also *Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 208-209 (*Bustamante*).) “Where the existence of a contract is at issue and the evidence is conflicting or admits of more than one inference, it is for the trier of fact to determine whether the contract actually existed.” (*Bustamante, supra*, 141 Cal.App.4th at p. 208.)

When it is clear the parties contemplated there would only be a contract upon execution of a formal writing, then the failure to execute a written contract means no binding contract was created. (*Banner Entertainment, Inc. v. Superior Court* (1998)

62 Cal.App.4th 348, 358 (*Banner Entertainment*).) But if the parties orally agreed upon all the terms and conditions of an agreement “with the mutual intention that the oral agreement should thereupon become binding, the mere fact that a formal written agreement to the same effect has not yet been signed does not alter the binding validity of the oral agreement. [Citation.]” (*Ibid.*) Whether the parties intended their oral agreement should be binding “is to be determined from the surrounding facts and circumstances of a particular case and is a question of fact for the trial court. [Citation.]” (*Ibid.*)

Here, there is a material issue of fact as to whether the parties intended a final written contract was required for their alleged agreement to be binding. Ward-Askew’s cross-complaint alleged breach of an agreement to sell ERMIC to Ward-Askew for \$26 million based upon the Letter of Intent, which the parties subsequently modified and extended through oral and written communications. The cross-complaint alleged the parties agreed their subsequent “oral and written agreements” regarding the sale “were valid and binding, notwithstanding their intent to sign a more formal writing memorializing their agreements.” (Ward-Askew also alleged a cause of action for breach of the no-shop provision in the Letter of Intent, a claim it has since abandoned.)

In the face of DISC’s argument that pursuant to the Letter of Intent, there could be no binding agreement without a final executed written contract, Ward-Askew presented evidence the parties had reached an oral agreement regarding the sale of ERMIC at their meeting on March 3. Ward-Askew presented declarations from its representatives who attended the March 3 meeting stating the parties agreed the terms reached at that meeting were binding, notwithstanding their understanding they would eventually memorialize the agreement in a written stock purchase agreement. Ward-Askew asserted the oral agreement replaced the Letter of Intent.

The trial court declined to consider evidence related to what was termed Ward-Askew's contract "novation" argument, i.e., that the contract being sued upon was the oral agreement reached on March 3, which replaced the Letter of Intent, because it found the argument to be outside the issues raised in the cross-complaint. (See *Government Employees Ins. Co.*, *supra*, 79 Cal.App.4th at pp. 98-99, fn. 4 ["A defendant moving for summary judgment need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers. [Citation.]".]) And the court determined the contract theory pled by Ward-Askew in the cross-complaint—that the agreement resulted from the Letter of Intent as *modified* by subsequent oral agreements—conflicted with the theory asserted in opposition to summary adjudication—that the Letter of Intent had been *replaced* by the subsequent oral agreement.

But contract novation is simply a legal conclusion based on the alleged facts. (*Bank of America etc. Assn. v. Radford* (1936) 7 Cal.2d 205, 208.) And when the facts submitted in opposition to a summary adjudication motion demonstrate a material factual issue, the motion should not be granted based on the pleader's mistaken legal conclusions as to the affect of those facts. (*Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1067.)²

Here, the factual issues raised in Ward-Askew's opposition were well within the purview of the original cross-complaint. The cross-complaint alleged the

² Because we conclude there were material issues of fact, and summary adjudication of Ward-Askew's second cause of action for breach of contract was improper, we need not address the trial court's denial of Ward-Askew's motion to amend the cross-complaint on the grounds it was a sham pleading. We note however, "[I]t is an abuse of discretion to deny leave to amend where the opposing party was not misled or prejudiced by the amendment. [Citation.] . . . [I]t is irrelevant that new legal theories are introduced as long as the proposed amendments 'relate to the same general set of facts.'" [Citation.] Thus, under this state's liberal rules of pleading, 'the right of a party to amend to correct inadvertent misstatements of facts or erroneous allegations of terms cannot be denied.' [Citation.]" (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945.)

material terms of a contract for the sale of ERMIC, reached as a result of the original Letter of Intent as subsequently modified by oral and written agreements the parties intended to be binding. The opposition to summary adjudication asserted the operative contract terms resulted from an oral agreement largely reached on March 3. The opposition did not assert contract terms that differed from those alleged in the original cross-complaint.

DISC makes much of various discovery responses by Ward-Askew, which it asserts should be deemed binding on Ward-Askew. It asserts that in its response to DISC's form interrogatory No. 50.4, Ward-Askew specifically stated there had been no termination by novation of the Letter of Intent, and it should be bound by that response. But the interrogatory to which DISC refers was not so specific. It asked if, "*any agreement* alleged in the [cross-complaint]" had been terminated by novation, to which Ward-Askew replied, "No." (Italics added.) The court must liberally construe the evidence in opposition to the summary adjudication motion. (*Government Employees Ins. Co., supra*, 79 Cal.App.4th at p. 100.) One could liberally understand the response to mean that Ward-Askew did not contend the agreement to sell ERMIC on the terms alleged in the cross-complaint had been terminated by novation (as opposed to any specific understanding along the way).

DISC also asserts that in their depositions, both Ward and Askew testified as to their understanding a formal written contract was an "absolute prerequisite" to there being a binding contract. But again the deposition testimony was not so specific. Askew testified the parties envisioned preparing formal documentation, but he did not testify it was a prerequisite to the oral agreement being binding. Ward testified he too understood there would be formal documentation, and when asked if the deal could be terminated without formal documentation, replied, "I guess so. Yeah, if we didn't finalize the stock purchase agreement, the deal would be terminated." But that response could be interpreted as Ward's after-the-fact understanding of the potential legal effect of the lack

of a writing as opposed to his understanding of the parties' intentions at the time the agreement was reached. Ward and Askew both stated in declarations that at the March 3 meeting all material terms for the sale were reached and it was agreed the deal was binding at that time. La Pointe, who was also present, similarly declared that at the conclusion of the meeting, a deal had been reached.

We certainly agree the evidence on which DISC relies in support of its assertion the parties specifically intended there would not be an agreement for the sale of ERMIC unless and until the parties entered into a final written stock purchase agreement strongly supports its position. But that is not the test on summary adjudication. There is a material issue of fact as to whether the parties intended the alleged oral agreement to be binding notwithstanding the understanding there would eventually be a writing documenting that understanding.

CNA/Maple

DISC argues that even if there is a material issue of fact regarding the parties' intent the contract be reduced to a writing, summary adjudication of Ward-Askew's breach of contract cause of action should be affirmed on the alternate contract formation grounds raised in its motion and upon which the trial court did not rule. First, it contends no binding agreement to sell ERMIC to Ward-Askew was reached because the parties had not resolved the matter of Maple's potential residual liability to CNA. "California law is clear that there is no contract until there has been a meeting of the minds on all *material* points. [Citations.]" (*Banner Entertainment, supra*, 62 Cal.App.4th at pp. 357-358.) DISC argues the parties intended there could be no final agreement until the CNA/Maple residual liability issues were resolved.

Whether all material terms have been agreed to is a question of fact. (*In re Marriage of Assemi* (1994) 7 Cal.4th 896, 911.) There is evidence from which a trier of fact could conclude either the CNA/Maple issue was not material, or the parties had agreed to a resolution.

In his declaration, Ward stated that documents he received in the fall of 2005 regarding ERMIC being for sale made no mention CNA posed any obstacle. At a meeting in December 2005, Draney and Peterson said DISC and ERMIC were ““in the driver’s seat”” with regards to the CNA trust fund because agreements with CNA were not executed by CNA. They said those agreements would eventually have to be updated and signed but that could happen after the sale. At that time, and in subsequent meetings with Draney, Peterson, and CNA representatives, no one ever brought up concerns about Maple’s residual liability to CNA. The Letter of Intent made no mention of any CNA issues. In a telephone conversation in January 2006, Draney said Maple “might have a theoretical exposure to CNA for the deductible exposure in the extremely unlikely event ERMIC’s assets and reserves were inadequate to pay; that since ERMIC at that time had over [\$120 million] in assets with the CNA trust money being over funded by several million dollars for payment of future claims while ERMIC made investment income of its assets . . . the risk was very limited and remote. Draney and Peterson both stated *they were prepared to have DISC accept that risk.*” Neither Draney nor Peterson said they wanted terms in the contract that would eliminate or reduce Maple’s theoretical exposure to CNA. At the meeting on March 3, 2006, Draney and Peterson said they were “prepared to close the transaction with [Ward-Askew] ‘around CNA.’” Ward-Askew agreed to set aside an \$11 million letter of credit to cover any remaining deductibles owed to CNA by Maple, and Draney and Peterson “stated this was acceptable to DISC.” At no time did anyone at the March 3 meeting suggest DISC’s acceptance of Ward-Askew’s offer was conditional upon any action or agreement by CNA. In their declarations, Askew and LaPoint reiterated most of the same facts.

Regulatory Approval

DISC also argues regulatory approval of the sale of ERMIC to Ward-Askew was a condition precedent to contract formation. Since there was never

final approval of the transaction from either the State of Hawaii or Nevada, no binding contract was formed.

DISC relies on *Los Angeles Rams Football Club v. Cannon* (S.D.Cal. 1960) 185 F.Supp. 717. In that case the player and club executed a standard player's contract that expressly stated, "This agreement shall become valid and binding upon each party hereto only when, as and if it shall be approved by the Commissioner [of the National Football League]." (*Id.* at p. 721.) The player backed out before that approval was obtained. The court concluded no contract was formed because by its express terms "[a]pproval by the Commissioner [was] essential to the formation of a contract" (*Ibid.*)

We cannot say the requirement of regulatory approval was a condition precedent to formation of an agreement as opposed to a condition precedent to DISC's duty to perform. *Jacobs v. Freeman* (1980) 104 Cal.App.3d 177, is instructive. In that case, plaintiff-buyers entered into a contract with the agents of a corporation to buy real property, but the sale was subject to approval by the corporation's board of directors. The seller's agents breached the contract by failing to submit the contract for approval to the board of directors, and by withdrawing from the transaction. The trial court granted nonsuit, apparently having concluded "no binding contract arose between the parties because of the express provision that the escrow was subject to approval by the seller's board of directors." (*Id.* at p. 187.) The appellate court reversed concluding "the condition of board approval of the proposed sale was intended to be a condition precedent to the sellers' duty to convey title to the land rather than a condition precedent to the formation of a contract." (*Id.* at p. 189.) It reasoned the "argument that a contract does not arise when an agreement is executed with the understanding it will not become operative until approved by another person or body . . . [prevails] only where it can be said that reasonable persons would have understood that the agreement would not be effective" (*Ibid.*) Furthermore, the court concluded the requirement of third party

approval did not render the sellers' promise illusory because there was an implied covenant the parties would act in good faith to obtain that approval. (*Id.* at p. 188.)

Here, there is a material issue of fact as to whether the lack of regulatory approval excused DISC's performance. It is not disputed that regulatory approval was necessary. In their opposing declarations, Ward, Askew, and La Point all commented on the need for regulatory approval of the sale. All stated that at the conclusion of the March 3 meeting, there were two conditions to closing—regulatory approval and payment of the purchase price. Ward-Askew presented evidence indicating most steps to obtain that approval had been completed—ERMIC was redomesticated in Nevada, and at least on a staff level, the Nevada Insurance Commissioner had indicated approval. There was evidence the only thing precluding regulatory approval was DISC's refusal to execute a written stock purchase agreement.

DISPOSITION

The judgment is reversed. Appellants are awarded their costs on appeal.

O'LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.